# Supreme Court of the United States

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| In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. DIER & Co., and E. D. DIER & Co., Bankrupts, Appellants. | October Term, 1921. No. 874. |

## BRIEF FOR APPELLANTS

### Statement of Procedure

On January 14th, 1922, a petition in involuntary bankruptcy was filed against E. D. Dier & Co., a copartnership, appellants here.

On January 16th, 1922, the United States District Court for the Southern District of New York appointed a Receiver in Bankruptcy, without notice to the bankrupts, and directed him to take possession of all books, records, documents, etc., of E. D. Dier & Co., and such books, records and documents were ordered to be turned over to the Receiver. The order specifically directed and commanded the Bankrupts to turn over to the Receiver all of their property, including "Ac-

count books" and "Records." (See order appointing Receiver, fols. 1-4.)

Acting under such order of appointment, and without any notice to the Bankrupts, the Receiver took physical possession of all of their books, records and papers.

While the Receiver under the order of the Court had possession of such books, records and papers, and before the appointment of a Trustee in Bankruptcy, the District Attorney of the County of New York issued a subpoena to the Receiver, in substance, directing him to turn over the books and records to the District Attorney for use in a criminal prosecution against the bankrupts. The bankrupts immediately, on February 16th, 1922, presented a petition to the District Court of the United States for the Southern District of New York, praying for an order to show cause why the Receiver should not be enjoined and restrained from delivering over the books and records to the District Attorney upon the ground that such delivery would be violative of the Constitutional privileges of the petitioners, in accordance with Amendments 4 and 5 to the United States Constitution, in that it would, in effect, be compelling the bankrupts to be witnesses against themselves. (See Petition, fols. 6-11.)

The order to show cause was granted and directed to Hon. Joab H. Banton, District Attorney of New York County, and Manfred W. Ehrich, as Receiver of the alleged bankrupts, and was returnable on February 20th, 1922. The Court also granted a stay and directed the Receiver to retain possession of the books, records, documents and papers of the alleged bankrupts until the further order of the Court. (See Order to Show Cause, fols. 4-6.) After argument, with decision reserved, Hon. Learned

Hand, District Judge for the Southern District of New York, made an order discharging the rule, the order containing the following clause:

> "FURTHER ORDERED that the Receiver herein and said alleged bankrupts deliver over said books, records and documents of said E. D. Dier and E. D. Dier & Company to the District Attorney of the County of New York, for use in said criminal proceedings against said Petitioners, if and when appropriate process for that purpose is duly served." (See Order, fols. 17-19.)

The Court filed an opinion which is printed in the record. (See Opinion, fols. 11-14.)

E. D. Dier & Co. thereupon applied for leave to appeal to this Court upon assignment of errors. (See Petition, fols. 22-25; see Assignment of Errors, fols. 19-22.)

The appeal was allowed on April 10th, 1922. (See order, fols. 25-26.)

The record was certified and filed in this Court on April 13th, 1922.

There has been no change of parties or attorneys pending appeal.

## Argument

### I

**The possession of the books, records and documents of the alleged bankrupts by the receiver was a possession enforced by the Court and was, in legal effect, the possession of the bankrupts.**

In the preface to the opinion by Judge Hand, it is stated:

> "The alleged bankrupts without objection surrendered possession of the books to the Receiver, who now holds them."

There is no evidence to this effect in the record. The Court appointed a receiver *ex parte* and commanded that he take possession of the books, records and documents of the then alleged bankrupts and the Receiver *took* possession without notice of any kind. There was at no time a voluntary surrender by E. D. Dier & Company to the Receiver and the Receiver's possession of the books was at all times an enforced possession.

It will be noted that the Petition in Bankruptcy was an involuntary proceeding instituted by creditors and that when the Receiver, upon appointment, took possession of the books, records and documents of the alleged bankrupts, he did so wholly under the specific order of the Court. This was not such a delivery of the books by the Bankrupts as constituted a waiver of their Constitutional rights. If they had interfered with the Receiver in obtaining possession of the books it would have been a contempt of Court. The order of the Court which was wholly *ex parte* did not in any way protect or seek to protect the Constitutional privileges of the alleged bankrupts. In this respect the order differed materially from

the order of the District Court in *Matter of Harris*, 221 U. S., 224, wherein the Court, while permitting the use of the books by the Receiver, expressly provided that they should not be used for any criminal proceedings. Justice Holmes writing the opinion of this Court in the *Harris* case *(supra)* said:

> "As the bankruptcy Court could have enforced little in favor of the Trustee, it could enforce possession *ad interim* in favor of the Receiver. In the properly careful provision to protect him from use of the books in aid of prosecution the bankrupt got all that he could ask."

In the case at bar the Bankrupts were not in any way protected by the order appointing the Receiver.

The syllabus in the *Harris* case *(supra)*, reads in part:

> "A bankrupt is not deprived of his constitutional right not to testify against himself by an order requiring him to surrender his books to the duly authorized Receiver."

As the order directing the delivery of the books to the Receiver contained no protective clause whatever, the Bankrupts asserted their Constitutional rights at the first effective moment, when the District Attorney sought to reach them by subpoena for use in a criminal proceeding.

The Receiver, under the order of the Court, did not take title to the property of the alleged bankrupts or to the books. He was merely a custodian and his possession was, in legal effect, the possession of the bankrupts. When, therefore, the subpoena directed the Receiver to turn over the books to the District Attorney, it, in legal effect, directed the ***Bankrupts*** to so turn over their

books, records, and documents, which was violative of their Constitutional rights.

Could it be maintained that the District Attorney could have procured by subpoena the books of E. D. Dier & Co. for use in a criminal prosecution against them? If then, the Receiver was only a custodian without title, has the *ex parte* order of the Court appointing the Receiver operated to deprive E. D. Dier & Co. of their Constitutional privileges? Is the subpoena served upon the Receiver—the legal Custodian—of any greater force than if served upon E. D. Dier & Co.?

Judge Hand in his opinion states that "it makes no difference" whether the books were in the possession of the Receiver or a Trustee in Bankruptcy. The obvious difference is that a Trustee under the Bankruptcy Act has title, whereas a Receiver is only an arm of the Court to hold possession without title and his possession is the possession of the bankrupts.

*In re* Hess, 134 Fed. R., 109.

Judge Hand also proceeded upon the theory that the bankrupts "surrendered possession" of their books, which was an erroneous construction of the order appointing the Receiver.

See:

Counselman v. Hitchcock, 142 U. S., 547;
Brown v. Walker, 161 U. S., 591;
Ensign v. Commonwealth of Penn., 227 U. S., 592.

## II

**The bankrupts' objection to the use of the books in the criminal prosecution by the District Attorney of New York County was made in due time.**

Immediately upon the demand by the District Attorney upon the Receiver for the delivery of the books and the service of the subpoena upon the Receiver, the Bankrupts instituted this proceeding by petition to restrain the delivery of such documents and for the assertion of their Constitutional rights. This was the earliest moment at which the claim of privilege could have been effectively asserted. The Bankrupts could not have interfered with the Receiver's taking possession of the books without subjecting themselves to punishment for contempt of Court. Judge Hand, in his opinion, states:

> "The test, I take it, is whether the surrender was resisted when the Receiver demanded possession."

In the case at Bar, there was no surrender of the books, etc. The Receiver simply *took* possession under the order appointing him. If we are right in our contention that the Receiver took no title and was the mere legal custodian of the property, then there could have been no waiver of Constitutional rights under the circumstances of this case. The alleged Bankrupts interposed their objection by application to the Court prior to the appointment of a trustee in bankruptcy and before title to any of their property had passed. Let us assume that the petition in bankruptcy had been dismissed, then the Bankrupts would again have been entitled to possession of their books. Could it be held that because the books had tem-

porarily passed into the legal possession of the Receiver, that their Constitutional rights with reference to criminal proceedings had been waived?

In *Johnson v. U. S.*, 228 U. S., 457, cited by Judge Hand, a very different state of facts was presented. There a *Trustee* in Bankruptcy had been appointed and the Bankrupt surrendered his books to the Trustee without reservation. This Court held, in substance, that when possession and *title* passed without protest from the bankrupt his privilege ended. In the case at bar, the Court will note that title had not passed before the assertion of the privilege, as the books were only held in the legal possession of the Receiver as Custodian.

See also:

Boyd v. U. S., 116 U. S., 616;
Werks v. U. S., 232 U. S., 383;
Flagg v. U. S., 233 Fed., 481;
Silverthorne Lumber Co. v. U. S., 251 U. S., 385;
Amos v. U. S., 255 U. S., 313.

## III

**The order is appealable to this Court.**

Section 239 of the Judicial Code (Act of March 3, 1911) authorizes an appeal to this Court as the order appealed from and the subject matter of the appeal, involve the application of the Constitution of the United States.

This is not a proceeding in bankruptcy nor one collateral thereto within the purview of the Act of January 28, 1915 (Ch. 22, Sec. 4) as amended by the Act of September 6, 1916 (Ch. 448, Sec. 3). It is a proceeding by petition to prevent the violation of a Constitutional privilege and is wholly distinct from the bankuptcy. It seeks only to restrain the District Attorney of New York County from using the books of citizens in a criminal prosecution against themselves, and does not affect or relate to the bankruptcy proceeding in any way whatsoever.

## IV

**The order should be reversed; the original stay continued, and the District Attorney restrained from the use of the books and records in any criminal prosecution against the appellants.**

New York, February 22, 1923.

NASH ROCKWOOD,
of Counsel for Appellants.